

Supreme Court, U. S.

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NO. 77-802

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IN THE

Supreme Court of the United States

October Term, 1977

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

ARGUMENT

Introduction

In its apparent zeal to make this case appear worthy of this Court's time and effort, petitioner has found it necessary to put to this Court the case, not as it actually exists, but as petitioner wishes it existed. The facts of this case are set forth in the district court's extensive findings, issued after the court had heard five weeks of testimony and had reviewed thousands of pages of exhibits; those findings take up about fifty-five pages of the appendix to the petition

here. At petitioner's request, many of those findings were reviewed by the court of appeals; the court unanimously affirmed, in a careful opinion covering ninety-six pages of the appendix. Yet, in critical respects, petitioner pretends that the lower courts had not made findings rejecting the factual predicates of arguments petitioner makes here, and pretends as well that certain legal arguments made here for the first time by petitioner's new counsel¹ were properly raised below.

In the sections of this brief that follow, we comment in turn upon each of the six questions petitioner submits for this Court's review, in light of the facts found below. As we demonstrate, there is nothing about this case that is worthy of this Court's plenary consideration.

Before turning to petitioner's six questions, we feel compelled to address certain general misimpressions that might result from petitioner's inaccurate and selective recitation of what this case is about.

From the various assertions contained in the petition's "Statement," the reader could be expected to assume that each of the following propositions is true: First, Northwest regularly employs "male 'flight service attendants' ('FSA's'), now called 'stewards'" at the same rate of pay as "female 'stewardesses.'" Petition (hereinafter Pet.) at 4. Second, Northwest also employs a higher rated class of in-flight employees known as "pursers"; the "job" of purser is distinguished from the "job" of stewardess or FSA because the former entails "cargo handling" responsibility

¹ Counsel on the petition were not involved in this case below. There, Northwest was represented by Henry Halladay, David Ranhheim, and William Martin of the Minneapolis firm of Dorsey, Marquart, Windhorst, West & Halladay. App. 2a. Although that firm continues to represent Northwest in ancillary proceedings in this case which are ongoing in the district court, it does not appear on the petition.

and "formal, inherent supervisory authority." Pet. 4, 5, 7, 9. Third, the cabin attendants' union had, together with the Company, addressed the issue whether the purser "job" was sufficiently different from that of the FSA or stewardess "job" to justify a substantial pay differential, and found that it was. Pet. 6, 7. Fourth, the Company had, for reasons "understandable from an historical perspective," restricted purser positions to men prior to 1967, and thus fell innocently into the trap of having jobs segregated by sex. *Id.* at 9. Fifth, the courts below, particularly the court of appeals, had it in for Northwest, "adopt[ing] standards and tests that would have the effect of inflating backpay awards and imposing the highest conceivable liability." *Id.* at 10. Sixth, due apparently to this zeal of the lower courts, but not to anything Northwest has been found to have done, Northwest is faced with "one of the largest judgments—and perhaps *the* largest—ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act." *Id.* at 4. Seventh, the calamity which now confronts Northwest is one which Congress intended to avoid by its enactment, in 1947, of 29 U.S.C. § 251. *Id.* at 12-13.

Each of these propositions, however, is demonstrably false.

First, it is not true that the Company has regularly employed male cabin attendants at the same pay as stewardesses. The Company hired its last FSA in 1957; as of 1965 there were only three left; and as of 1970 there were no FSAs employed by Northwest. App. 8a-9a, ¶¶ 17-19.² Thus, at all points pertinent to this litigation, all or virtually all of the male cabin attendants were called "pursers"; and all female cabin attendants were called

² When the Company had employed FSAs, FSAs had a contractual right to fill purser vacancies in seniority order. App. 7a, ¶ 14.

"stewardesses."³

Second, the district court found as fact that pursers and stewardesses did not occupy separate "jobs," but rather both occupied a single job—cabin attendant—whose function was to serve and protect customers. App. 36a-37a, ¶¶ 51-53; *id.* 51a, ¶ 69. Northwest did not argue in the courts below that "cargo handling" was a duty distinguishing the purser's work, perhaps because pursers stopped doing it in 1948 when the Company hired ground personnel for that purpose.⁴ Although Northwest *contended* in the district court that pursers had supervisory authority and stewardesses did not, the district court found as fact that pursers were not supervisors and had no "supervisory" responsibilities that stewardesses did not also have. See Part II, *infra*.

Third, there is no evidence in this record that the union, either separately or together with the Company, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any difference in duties, and Northwest so admitted in its reply brief to the Court of Appeals. See part I, A, *infra*.

Fourth, the Company did not, in 1967, realizing the error of its prior ways, open the higher paid, although otherwise equal, purser classification to women. In fact, the district court found—and Northwest did not appeal the finding—a consistent and intentional pattern of discrimination subsequent to that date denying all women access to the higher

³ As of 1970, one female had, after the Company had placed every conceivable obstacle in her path, been "promoted" to a purser position. See p. 12, *infra*. At the time this suit was filed, Northwest employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. App. 8a, ¶ 19.

⁴ Trial Tr. 2808-10 (Testimony of Northwest's Manager of Cabin Service).

pay scale enjoyed by the men. App. 11a-22a, ¶¶ 24-38. At the time of the district court's decision, in 1973, there was not a single woman purser. App. 15a, 16a-17a, ¶¶ 31, 35. Further, despite Northwest's protestations of innocence and "good faith," the courts below found that Northwest had engaged in a pervasive pattern of discrimination against female cabin attendants affecting virtually every aspect of the employment relationship. App. 22a-27a, ¶ 39.

Fifth, the opinions of the courts below stand as conclusive contradiction of petitioner's suggestion that those courts were somehow biased. Moreover, far from taking "each opportunity" to "inflate backpay awards and impose the highest conceivable liability," Pet. 10, the court of appeals ruled against the plaintiffs' position on a number of monetary issues, including one which the court conceded had not properly been preserved by Northwest.⁵

Sixth, the size of the judgment is simply a reflection of the extent to which the members of the plaintiff class have been harmed by Northwest's unlawful conduct. After all, this is a Company that, *inter alia*, paid men 20 to 55 percent more than women⁶ for performing work which has been determined by two federal courts to be "equal". This suit was filed in 1970, but Northwest did not equalize the men's and women's salaries until 1976, more than two years after the district court declared the work of pursers and stewardesses "equal"; indeed, some of the adjudicated statutory violations, for which the Company has a monetary liability, are still continuing; thus, the monetary remedy here covers violations spanning more than a decade. Furthermore, the award includes remedies for the numerous

⁵ The court of appeals stated, with respect to that issue, "the remedial order in this case is to make employees whole, but not more than whole." App. 91c. For other, similar rulings, see App. 72c-73c, 77c-78c, 81c-84c.

⁶ App. 55a, ¶ 80.

other violations found below which Northwest does not seek to have reviewed by this Court.

Seventh, 29 U.S.C. § 251 has nothing to do with this case. That is the section in which Congress explained why it was overturning retroactively the Supreme Court's "portal-to-portal" decisions; it has no application to any of the issues presented herein. See part IV, *infra*. To date, Congress has evinced no intention retroactively to overturn either Title VII or the Equal Pay Act, nor to deprive victimized employees of the statutory remedies prescribed for violations of those statutes.

I

Northwest's first question presented is "whether the existence of a *bona fide* collective bargaining agreement treating two jobs as different and establishing wage differentials between them precludes a finding that the jobs are equal and that the employer has 'discriminate[d] . . . on the basis of sex' within the meaning of the Equal Pay Act" (Pet. 2). Under this banner, Northwest in fact advances (as it recognizes, Pet. 19-20) two distinct legal propositions:

- (A) collectively bargained wage rates are "tantamount to a *bona fide* job evaluation plan," (Pet. 14), and (Northwest says) this Court has held that wage differentials resulting from *bona fide* job evaluation cannot be invalidated under the Equal Pay Act; and
- (B) if differentials are established in a good faith albeit mistaken belief that women's and men's jobs are not equal (a mistake which may result from collective bargaining as from any other source) there can be no violation of the Equal Pay Act, for such differentials are based not on sex, but on a good faith mistake.

Neither proposition was timely raised in the lower courts (indeed, the second was *never* raised), there is no evidence furnishing a factual predicate for these arguments, and in any event the arguments are, as legal propositions, frivolous.

A. Collective Bargaining

Northwest did not argue in the district court that the wage differential between pursers and stewardesses was outside the reach of the Equal Pay Act because collectively bargained. When it first thought of the argument, in the Court of Appeals, it was embarrassed by a threshold difficulty: it had introduced no evidence which suggested in any manner that the collectively bargained wage rates had resulted from a process "tantamount to a *bona fide* job evaluation plan." The record showed only that when Northwest first hired men as cabin attendants, and created the purser classification to receive them, it unilaterally established a higher wage scale for pursers than its stewardesses enjoyed; and that from that point on the union continually sought and obtained "across-the-board" wage increases for all employees. Northwest asked the Court of Appeals to infer, from the single fact that "collective bargaining produced unequal rates," that the company and union negotiators "must have" evaluated the jobs and decided they were different.^{6a} The court quite properly concluded that the

^{6a} In its openings brief to the Court of Appeals, pp. 27, 37, where the legal argument made its first appearance in this case, Northwest asserted that the company and the union had "evaluated" the jobs and, having "freely agreed that the positions of purser and those of cabin attendants were not substantially identical or equal," established a "*bona fide*, collectively bargained job evaluation system" paying pursers more than stewardesses. We responded that "there is not one word of record evidence indicating that NWA and the union ever compared the duties of the jobs and/or their relative worth, let alone established a job evaluation system"; that "this record does not show any union 'evaluation' of the comparative duties of the job, nor any 'agreement' that their duties warrant different pay." Brief for Plaintiffs, pp. 5, 45. In its reply brief, Northwest conceded this, but argued that the Court could infer these facts from the single fact that "collective bargaining produced unequal rates." Appellant's Combined Reply Brief and Brief on Cross-Appeal, p. 5. The union "must have evaluated the jobs

inference was impermissible from a barren record (24c-25c).

Thus, even if there were room under the scheme of the Act for a legal argument that wage differentials are outside the Act's reach if they reflect a good faith agreement in collective bargaining that jobs are different, Northwest is precluded from advancing that argument by its failure to prove the factual predicate for the argument.^{6b} But the court below was also correct, and indisputably so, in its additional holding that the argument is without merit as a legal proposition (25c-26c).

When Congress was considering adoption of the Equal Pay Act, representatives of American industry sought an exemption for wage differentials resulting from good faith collective bargaining, arguing that bargaining partners are in the best position to evaluate the relative worth of jobs and their judgments should not be subjected to second-guessing by the courts.⁷ The effort failed; Congress did not

... [T]he parties necessarily engaged in a comparison of job values. No evidence suggests the contrary . . . The only possible conclusion is that the parties were engaged in bona fide job evaluation." *Id.*, pp. 5-6.

^{6b} It is of no legal significance that women constituted a majority of the bargaining unit, but it is worth noting anyway that this fact does not mean (as Northwest implies) that women "called the shots" in negotiations. The bargaining unit was at all times affiliated with predominantly male national unions; collective bargaining was always managed by national union representatives who were male; and the union's positions in negotiations often did not reflect the women's interests. Northwest's own brief to the Court of Appeals recited two dramatic examples of this: the union's unwillingness, in the face of pursers' objections, to press for equal treatment for stewardesses who became pursers, Appellant's Brief pp. 7-8; and the union's failure to seek equal pay in the 1972 and 1974 negotiations, despite the pendency of this lawsuit and (by 1974) the district court's decision directing equalization, *id.* at 38. See also App. 7a, ¶¶ 13-14; App. 9a, ¶ 22.

⁷ See, e.g., Hearings on Equal Pay Act before the Special Subcommittee on Labor of the House Committee on Education and

exempt wage differentials resulting from good faith collective bargaining.⁸ Instead, Congress adopted the "minimum alternative" sought by industry representatives:⁹ it deferred the Act's effective date an additional year in the case of collectively bargained wage rates¹⁰ to afford negotiators a "grace period" in which to "become acquainted with [the Act's] demands and to make any necessary adjustments."¹¹ Congress also added 29 U.S.C. § 206(d)(2) to the bill, prohibiting unions from causing wage discrimination, to assure that unions would not stand in the way of employers' eliminating wage differentials in collective bargaining agreements which violated the Act.¹²

Northwest's legal argument thus is an effort to secure by judicial fiat what industry sought and did not get from Congress. It is hardly surprising that all of the federal courts—from this Court on down¹³—have applied the Act to invalidate wage differentials between jobs which in fact

Labor, 88th Cong., 1st Sess., 99, 101-102, 241-242, 250-251, 186 (1963) (hereinafter House Hearings). See generally BNA Operations Manual, *Equal Pay for Equal Work*, pp. 63-67 (1963) (hereinafter BNA Manual).

⁸ BNA Manual 67.

⁹ House Hearings 251, 148.

¹⁰ Section 4 of the Equal Pay Act, not codified, Public Law 88-38, 77 Stat. 57 (1963).

¹¹ 109 Cong. Rec. 9203 (1963) (Rep. Roosevelt). See also *id.* at 7682 (Rep. Goodell); *id.* at 9193 (Rep. Bolton); *id.* at 9196 (Rep. Frelinghuysen); *id.* at 9199 (Rep. Griffin).

¹² BNA Manual 67. See 109 Cong. Rec. 9209 (colloquy between Reps. Goodell and O'Hara).

¹³ See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 192 & n. 4, 194, 208-209 (1974); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Shultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970); *Hodgson v. Sagner, Inc.*, 326 F.Supp. 371 (D. Md. 1971), affirmed *sub nom. Hodgson v. Baltimore Regional Joint Board, Amalgamated Clothing Workers*, 462 F.2d 180 (4th Cir. 1972); *Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977); *Denicola v. G. C. Murphy Co.*, 562 F.2d 889 (3rd Cir. 1977).

constitute "equal work" notwithstanding collective bargaining histories treating them as different.¹⁴

B. Good Faith

The argument that if a wage differential is adopted in the good faith but mistaken belief that jobs are different then that differential is not "based on sex" and thus does not violate the Equal Pay Act, is made for the first time in this Court. As we explain infra, pp. 15-16, this argument, even if it had merit, would be an affirmative defense, which Northwest waived by not pleading. Because Northwest never made the claim below, plaintiffs were not on notice of any need to introduce evidence rebutting the contention, and the lower courts had no occasion to address the contention either factually or legally. It is apparent, however, from what the lower courts *did* say, that if the argument had been made to them they would have found it factually

¹⁴ It bears noting that Northwest's legal argument is defective for yet another reason: it misreads this Court's opinion in *Corning*. Northwest thinks that this Court held in *Corning* that wage differentials resulting from job evaluation are *per se* exempt from invalidation under the Equal Pay Act; it is that "holding" to which it seeks to analogize collective bargaining. But this Court did not hold the results of job evaluation exempt. It merely recognized that Congress had incorporated the same standards into the Act as are customarily employed in job evaluation programs, and that it can thus be "anticipated" that differentials resulting from a bona fide job classification program would not violate the Act. *Corning*, 417 U.S. at 201, quoting the House Report. As Congressman Frelinghuysen, who had spearheaded the incorporation of job evaluation standards into the Act, explained:

"A bona fide job classification system will *normally* furnish the answer to a claim of discrimination. But in any event the Labor Department or the employee, where an employee brings suit, will have the burden of proving to the court's satisfaction that a violation has occurred." (109 Cong. Rec. 9196 (1963), emphasis added).

deficient even on the existing record.¹⁵ For those courts made findings which are consistent only with a conclusion that Northwest's dual wage scale was motivated by a discriminatory purpose.

The findings below establish that Northwest engaged in a pattern of intentional sex discrimination which pervaded virtually every aspect of the cabin attendant's employment relationship—a pattern which Northwest no longer disputes in this litigation.¹⁶ One element of that pattern was North-

¹⁵ Northwest's entire argument to the contrary is predicated upon a single statement made by the district court in a different context for a different purpose—a statement which will not bear the weight which Northwest tries to pile on it. Five months after issuance of its findings of fact and conclusions of law, the district court issued its remedial order, which was accompanied by an explanatory memorandum. In that memorandum, the court explained that it was denying liquidated damages because, *inter alia*, Northwest had established the "good faith" required by 29 U.S.C. § 260. In the court's view, Northwest had met this standard by demonstrating that it believed in "good faith" that the purser and stewardess jobs would be found not to constitute "equal work" within the meaning of the Equal Pay Act (App. 1b-2b). That finding is a far cry, however, from a finding that the Company was not motivated by sex in deciding to pay the jobs differently. A company may be motivated by sex in deciding to pay women less than men, and yet believe in good faith that that decision will not contravene an Act which is operative only if the jobs meet a statutory definition of "equal work." That the court found only the latter is evident from its express findings of discriminatory motivation described in the text.

¹⁶ In addition to the discriminatory refusal to allow women to attain the higher pay scale enjoyed by men, and the discriminatory pay scales themselves, both described in the text *infra*, the district court found that Northwest discriminated against female cabin attendants on the basis of sex in each of the following respects: imposing weight limits upon women, but not men, and suspending and firing women for being five pounds overweight while allowing "very substantially overweight" men to remain at work (App. 22a-

west's refusal to permit women to be classified as pursers and thus attain the higher wage scale.^{16b} Northwest went to extraordinary lengths to block women's access to the purser classification, which are described in graphic detail in the district court's findings.^{16c} The one woman who survived this gauntlet and became classified as a purser was paid less than her male purser contemporaries, and was "demoted" back to stewardess shortly after this suit was filed.^{16d} Northwest did not appeal any of these findings of discrimination.^{16e}

24a, ¶ 39(1)-(4); App. 58a); awarding men single rooms on layovers, while requiring women to share double rooms (App. 24a, ¶ 39(5)-(6); App. 58a); allowing men to wear eyeglasses but forbidding women from wearing eyeglasses (App. 24a-25a, ¶ 39(7)-(9); App. 58a); allowing men an unrestricted choice of carry-on luggage, while requiring women to purchase luggage strictly prescribed as to brand, size, and color (App. 25a, ¶ 39(10)-(11); App. 58a); paying men, but not women, a uniform cleaning allowance (App. 25a, ¶ 39(12); App. 58a); prescribing a "chain of command" which precluded men from ever being subordinate to women, even when they admittedly held the same job and the women were senior (App. 25a, ¶ 39(13); App. 58a); and imposing different maximum height requirements for men and women (App. 25a, ¶ 39(14); App. 58a). Northwest appealed only some of these findings to the court of appeals (App. 17c, and n. 81), and that court found all the challenged findings amply supported by the record (App. 40c-49c). Northwest does not seek review in this Court of the holding that it discriminated in these respects.

^{16b} In 1970, when this suit was filed, Northwest employed 137 male cabin attendants, all classified as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. (App. 8a, ¶ 19). Between the effective date of Title VII and the filing of this suit, Northwest had hired 118 new male cabin attendants, all as pursers, and 2,224 female cabin attendants, all as stewardesses (App. 9a, ¶ 20).

^{16c} App. 9a-22a; ¶¶ 22-38; App. 33a-34a, ¶ 45.

^{16d} App. 15a-17a, ¶¶ 32-35; App. 57a, ¶¶ 3; App. 58a, ¶¶ 5(d), 5(f).

^{16e} A number of courts have held, in rejecting employer defenses

Of greatest importance, the district court found a total inconsistency between reality and Northwest's professed reasons for paying pursers more than stewardesses. The court found with respect to each of these proffered reasons that Northwest's behavior belied its claim. Thus, in each case where a duty or responsibility was asserted to justify a distinction between pursers and stewardesses, the court found (1) that the duty or responsibility was performed by stewardesses as well as pursers, and (2) that Northwest did not pay either pursers or stewardesses any different amount according to whether they were assigned such duties or responsibilities. On appeal, the court below indicated its firm conclusion that these inconsistencies reflect a discriminatory purpose. In its discussion of "the guiding principles," the court stated:

"The conclusion to be drawn, when any of these inconsistent patterns exist, is that

"[d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That,

based on the "factor other than sex" exemption, discussed *infra*, that discrimination in filling jobs which are in fact "equal work" is itself probative evidence that the employer was motivated by discriminatory purpose in paying them differently. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905 (1970); *Shultz v. First Victoria National Bank*, 420 F.2d 648, 654-655 (5th Cir. 1969); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 498 (4th Cir. 1972); *Hodgson v. Security National Bank of Sioux City*, 460 F.2d 57, 61-63 (8th Cir. 1972); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1044-48 (5th Cir. 1973), cert. denied, 414 U.S. 822 (1973); *Brennan v. Owensboro-Daviess Co. Hospital*, 523 F.2d 1013 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976). In this case, as we next recount in text, the findings provide much more direct evidence of discriminatory purpose in paying pursers more than stewardesses.

however, is precisely the criterion for setting wages that the Act prohibits.''"^{16*}

Turning to "the case at bar," the court below recounted at length inconsistencies in Northwest's pay practices,^{16*} and concluded:

"This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate."^{16*}

In sum, if Northwest had argued below that discriminatory purpose was required for an Equal Pay Act violation, it is virtually certain that the courts below would have found such a purpose.

But even if Northwest had raised the issue in the lower courts, and even if it were indisputable that Northwest was not actuated by a discriminatory purpose, the legal proposition it asserts—that there can be no Equal Pay Act violation if the employer established the wage differential in good faith—is demonstrably frivolous, has been uniformly rejected, and does not merit consideration by this Court.

The most obvious demonstration of the fallacy of Northwest's contention is furnished by 29 U.S.C. §260, which defines the conditions under which an employer may escape *double* damages for an Equal Pay Act violation. To invoke the protection of §260, an employer must prove, *inter alia*, that he acted in "good faith" in compensating the jobs differently. But if such "good faith" were intended by Congress to exculpate the employer entirely, Congress would not have made it a condition to escaping *double* damages.

^{16*} App. 33c, quoting, *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 286 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

^{16*} App. 33c-35c; see also App. 36c-38c, n. 153.

^{16*} App. 35c.

Northwest is in the incongruous position of arguing in Part I of its petition that employment decisions made in "good faith" do not violate the Act at all (Pet. 13-20), while ultimately having to confess in Part IV that the *true* import of "good faith" is as a defense to double damages (Pet. 29-32).

That a good faith belief that jobs are different is irrelevant in determining whether the Equal Pay Act has been violated is confirmed by the structure of the statute, its legislative history and purpose, and its uniform construction by this Court and the lower courts.

To begin with, it is clear that a plaintiff meets her burden under the Equal Pay Act by proving that she is being paid lower wages than men for equal work; her burden does not include proving that the employer was discriminatorily motivated in establishing the wage differential. This Court so held in *Corning*, noting the unanimity in the lower courts on the point, 407 U.S. at 195-197:

The Act's basic structure and operation are . . . straightforward. In order to make out a case under the Act, the Secretary¹⁷ must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Although the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue, as both of the courts below recognized.

The Act also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential

¹⁷ The Act is enforceable both by the Secretary (as in *Corning*) and by affected employees (as here). 29 U.S.C. §§ 216(b), (c).

based on any other factor other than sex." Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof. [Footnotes omitted]¹⁸

Thus, if "good faith mistaken belief" were at all relevant to the question whether a violation had occurred, it would have to be as an affirmative defense under the "factor other than sex" exemption. Northwest never pleaded such a defense, indeed did not raise it in any fashion until this Court, and thus has waived it.¹⁹ But even if such a defense had been pleaded, Northwest would not have been helped.

¹⁸ Three members of this Court dissented from the ultimate holding in *Corning* "for the reasons stated by Judge Adams in his opinion for the Court of Appeals in *Brennan v. Corning Glass Works*, 480 F.2d 1254 (CA 3 1973)," 417 U.S. at 210. On the point quoted here, Judge Adams' opinion was in complete accord, 480 F.2d at 1258:

"Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions, the employer, in order to prevail on the merits, must demonstrate that the wage differential is made 'pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .'" (Footnote omitted)

¹⁹ Rules 8(c), 12(h), F.R.Civ.P. For FLSA cases see, e.g., *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104 (9th Cir. 1975); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 184 (8th Cir. 1975); *Mitchell v. Williams*, 420 F.2d 67, 68 n. 2 (8th Cir. 1969), and cases cited therein; *Wirtz v. F. M. Sloan, Inc.*, 411 F.2d 56, 60 (3rd Cir. 1969), affirming 285 F. Supp. 669, 675 (W.D. Pa. 1968).

The language of the exemption, in relevant part, is:

"except where such payment is made *pursuant to . . . (iv) a differential* based on any other factor other than sex" (emphasis added).

A mistaken belief is not "a differential," and a payment made pursuant to such a belief is not a "payment . . . made *pursuant to . . . a differential* based on any other factor other than sex." As the language clearly contemplates, an exception depends upon the existence of an objective difference justifying the payment of higher wages to some employees than to others. And that is what Congress intended. It placed the burden on plaintiffs to show job equality in the four respects universally recognized as relevant in job classification programs: skill, effort, responsibility, and working conditions. *Corning*, *supra*, 417 U.S. at 198-201. But Congress recognized that there might yet be other objective considerations, apart from sex, which would justify paying some employees more than others, and the exceptions were designed to enable employers to avoid liability by proving that their wage differentials were based upon such considerations. *Id.* at 204. That there must be objective factors justifying wage differentials is apparent from each of the definitive congressional statements of the sweep of the exceptions clause.²⁰ Nowhere in the legislative history is there a suggestion that an erroneous belief that job duties are different would exonerate an employer from liability.

²⁰ H. R. Rep. No. 309, 88th Cong. 1st Sess. 3, (1963) (hereinafter "House Report"):

"As it is impossible to list each and every exception, the broad general exclusion has . . . been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded . . ."

Accord. 109 Cong. Rec. 9206, 9208 (Rep. Goodell); *Id.* at 9196 (Rep. Thompson).

Indeed, to so construe the Act would undermine the very purpose for its adoption. The Equal Pay Act was economic legislation. Its central purpose, recognized in *Corning*, and confirmed by the declaration of policy in the statute²¹ and by its legislative history,²² was "to require that 'equal work will be rewarded by equal wages,'" 417 U.S. at 195. "The whole purpose of the Act was to require that these depressed wages be raised," *id.* at 207. But that central purpose would be undermined if the Act were inapplicable

²¹ Section 2 of the Equal Pay Act, which is not codified, provides:

"Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

- (1) depresses wages and living standards for employees necessary for their health and efficiency;
- (2) prevents the maximum utilization of the available labor resources;
- (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
- (4) burdens commerce and the free flow of goods in commerce; and
- (5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several states and with foreign nations, to correct the conditions above referred to in such industries."

Public Law 88-38 (1963), 77 Stat. 56.

²² "The bill . . . would add one additional fair labor standard to the [FLSA]; namely that employees doing equal work should be paid equal wages, regardless of sex." H. Rep. No. 309, 88th Cong. 1st Sess. (1963), reprinted at 109 Cong. Rec. 9210 (1963). "The objective of this legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages . . . This bill would provide, in effect . . . that equal work will be rewarded by equal wages." S. Rep. No. 176, 88th Cong. 1st Sess. (1963), reprinted at 109 Cong. Rec. 8914 (1963). See also 109 Cong. Rec. 8914 (Sen. Mansfield); *id.* at 9193 (Rep. St. George); *id.* at 9196 (Rep. Frelinghuysen); *id.* at 9197 (Rep. Griffin); *id.* at 9212 (Rep. Ryan).

whenever an employer believed *mistakenly* that jobs were different.

In sum, even if there were evidence in the record supporting the belated claim of mistaken good faith, and even if the claim were not foreclosed, there would still be no reason for this Court to review the consistent rulings of the lower courts that good faith does not defeat an Equal Pay Act claim.²³

II

The second question Northwest seeks to present here could be reached only if this Court were willing to reverse numerous findings of fact entered by the district court and affirmed by the court of appeals. Northwest wants this Court to decide whether two jobs can be found to require "equal skill, effort, and responsibility" within the meaning of the Equal Pay Act when one job is that of a supervisor and the other is that of a supervisee. But that is not what the lower courts found to be the case here. In the district court, Northwest contended that the purser was a supervisor and the stewardess was not. But the district court rejected that contention as a matter of fact, finding as fact that: (1) the so-called "supervisory" duties asserted by Northwest were assigned to and performed by both pursers and stewardesses; (2) the "supervisory" duties of stewardesses were the same as those of pursers; and (3) the "supervisory" duties, no matter by whom performed, were not in truth supervisory—the district court invariably put quotation marks around the word—but trivial and incidental to the main functions of the cabin attendant job—func-

²³ See, e.g., *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 422-423 (5th Cir. 1971); *Hodgson v. Daisy Manufacturing Co.*, 445 F.2d 823, 825 (8th Cir. 1971); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241-242 (5th Cir. 1973).

tions which the court found to be virtually identical whether performed by a purser or a stewardess.²⁴ The court of appeals reviewed these findings and found them supported by substantial evidence. Northwest wants this Court to reverse these fact findings.

Throughout the trial, Northwest attempted to depict "purser" and "stewardess" as two separate jobs. But the trial court found that there was a single job—cabin attendant—to which the company assigned employees denominated purser and stewardess (App. 36a, ¶ 51):

"Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification. In general, cabin attendants are responsible for making pre-departure checks of the cabin; greeting and seating passengers; securing the cabin for take-off; providing food and beverage service; tending to passenger needs; briefing passengers on emergency procedures; guiding and assisting passengers in the event of emergencies; completing required documentation; answering passenger questions; keeping the cabin in a neat and orderly condition, before, during, and after the flight; insuring that passengers conform to required regulations; and deplaning passengers."

Neither pursers nor stewardesses, who are in a single bargaining unit, have any of the duties associated with supervision. They have no authority to suspend, discipline, or even warn other cabin attendants. They have no responsibility to recommend such action to their superiors. They are not responsible for evaluating the performance of other cabin attendants on their flights, unless specifically requested to do so by their superiors. They do not have authority to give other cabin attendants time off. All cabin attendants are equally responsible for reporting acts of misconduct by other cabin attendants to their superiors.

Not once does Northwest's 550-page Cabin Service Manual, which describes the purser and stewardess duties in

meticulous detail, refer to the purser or stewardess as "supervisor," and not once does it describe any of their duties as "supervisory."²⁵ Northwest has another category of employees, called "inflight supervisors," who do perform supervisory duties: they evaluate and discipline pursers and stewardesses, and conduct periodic "check rides" to monitor their performance. In-flight supervisors, unlike pursers and stewardesses, are not in the bargaining unit. There was, of course, no claim in this case that the duties of in-flight supervisors constitute "equal work" with stewardesses.

While the assigned duties of all cabin attendants are the same, the district court recognized that because relatively new cabin attendants may be uncertain of their duties and how to perform them the Company has an interest in assuring that more experienced cabin attendants on the flight help them out if they encounter any difficulties. Two cabin attendants on each flight—one in the first class section (the "senior cabin attendant") and one in the tourist section

²⁵ There are minor differences of wording in the Cabin Service Manual and collective bargaining agreement in describing the functions of pursers and stewardesses, but the district court found that in practice the functions assigned to and performed by pursers and stewardesses were the same. It is an obvious truism—confirmed uniformly by the court decisions—that the reality, and not inaccurate job descriptions, controls the question whether men and women are performing "equal work." 29 C.F.R. § 800.121; *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 724 (5th Cir. 1970); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1049-50, n. 12 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288-289 (4th Cir. 1974), cert. denied 420 U.S. 972 (1975); *Brennan v. Owensboro-Daviess Co. Hosp.*, 523 F.2d 1013, 1017 n. 7 (6th Cir. 1975); *Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976); *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148, 154 (3rd Cir. 1976), cert. denied 430 U.S. 946 (1977); *Katz v. School District of Clayton, Mo.*, 557 F.2d 153, 156 (8th Cir. 1977).

²⁴ App. 49a-51a, ¶ 67-69.

(the "senior in tourist")—are assigned this function, which the district court characterized as "monitoring and where necessary correcting the work of other cabin attendants." App. 49a-50a, ¶¶ 67-68. The senior cabin attendant and senior in tourist positions are occupied by both pursers and stewardesses; and on most flights both positions are occupied by stewardesses. Thus the "monitoring" function is a characteristic not of the purser or stewardess classification, but of the positions of senior cabin attendant and senior in tourist which both stewardesses and pursers occupy. *Id.*²⁶

All the pursers and stewardesses who testified at trial stated that the "monitoring" function of the senior cabin attendant position was exactly the same whether the position was occupied by a purser or a stewardess. And the district court so found. App. 49a-51a, ¶¶ 67-69.

Further, there was considerable evidence that the function was a trivial one no matter by whom performed. One witness with 24½ years experience as a purser with Northwest testified:

"Q. How often has something happened where you have had to step into a situation to correct the improper performance of duties by other cabin attendants on your flights?

"A. Only one time since I have been with Northwest Airlines."²⁷

Northwest never considered this monitoring responsibility important enough to provide additional compensation to the cabin attendants exercising it. Thus, pursers were all

²⁶ The cabin attendant filling the senior cabin attendant position on a flight also (1) determines time of meal service and movie showing; (2) moves attendants from section to section to balance workloads; and (3) gives predeparture briefings on emergency equipment and procedures. Each of these duties is performed according to prescribed written directives, and does not involve an exercise of discretion on the part of the cabin attendant.

²⁷ Appendix in court of appeals at 524.

paid according to the same scale whether or not they served as senior cabin attendant; and stewardesses were all paid according to the same scale, which was considerably lower than the purser scale, whether or not they served as senior cabin attendant.²⁸ Based on all the evidence, including an exhaustive showing of the nature of all aspects of the cabin attendant's job, the district court found that the monitoring function of senior cabin attendants "*whether purser or stewardess*" is "less important than . . . the other functions assigned to all cabin attendants." App. 51a, ¶ 69 (emphasis added).

Northwest asserts that by quoting this finding of the district court, "the court of appeals disparaged this supervisory responsibility" (Pet. 22). But it was the evidence as found by the district court which disparaged that responsibility.²⁹ And, in any event, that responsibility was not one that distinguished pursers from stewardesses, for the "supervisory" responsibility assigned to and performed by pursers—be it trivial or significant—was found to be identical to the "supervisory" responsibility assigned to and exercised by stewardesses.³⁰

²⁸ The legal significance of this fact is aptly described by the court of appeals at App. 31c-36c.

²⁹ See App. 29c-33c, where the court of appeals discusses the authorities and the legal principles applicable to the question whether "insubstantial or minor" additional duties may justify paying men more than women.

³⁰ At one point in its petition, Northwest cites certain of the findings below relating to *documentary* duties in support of its claim of an "undeniable material difference between the specific functions and responsibilities of pursers and stewardesses" (Pet. 22). The district court made meticulous findings respecting the documentary duties of pursers and stewardesses (App. 39a-47a, ¶¶ 58-63), all of which support its ultimate finding that pursers' documentary duties involve no greater skill, effort or responsibility than stewardesses' documentary duties (App. 47a, ¶ 64). Perhaps the most revealing demonstration of the weakness of Northwest's

In sum, Northwest has attempted to dress up as an issue of law what is in truth nothing more than a complaint about the findings of fact made by a district court and affirmed by a court of appeals. The courts below did not hold—as Northwest suggests, Pet. 24—that a lieutenant and a master sergeant perform “equal work.” Rather, they held that two corporals perform “equal work.” Northwest thinks that the courts below miscounted the employees’ respective stripes, and that one in fact had more than the other. It asks this Court to grant certiorari and conduct a recount.

III

The district court, finding Northwest’s violations of the Equal Pay Act “willful,” applied the three-year (rather than two-year) statute of limitations prescribed in 29 U.S.C. §255(a). The court below affirmed. Northwest seeks review of this holding, contending that a violation cannot be “willful” unless committed in bad faith. That contention is contrary to the construction normally accorded the term “willful” in civil statutes, has been rejected uniformly by the lower courts, and does not merit this Court’s attention.

“Willful, as we have said, is a word of many meanings, its construction often being influenced by its context.” *Spies v. United States*, 317 U.S. 492, 497 (1943). “The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” *United States v. Murdock*, 290 U.S. 390, 394 (1933). Only in certain criminal statutes has the word been construed to mean “an act done with a bad purpose.” *Murdock, supra*, 290 U.S. at 394; *United States v. Illinois Central R. Co.*, 303 U.S. 239, 242-243 (1938).

position is that it cites documentary duty findings in support of a claim relating to “supervision” while never citing the findings in which the district court expressly found the “supervisory” duties to be the same (App. 49a-50a, ¶¶ 67-68).

It is one thing to require a showing of bad purpose before criminal penalties are visited. But the stakes are quite different when, as here, the choice is between employees receiving wages improperly denied them and the employer escaping with a windfall which Congress found to be contrary to public policy (*Corning, supra*, 417 U.S. at 207).³¹ Thus it is hardly surprising that the lower courts, in force, have held that bad purpose is not required to activate the three-year statute of limitations contained in 29 U.S.C. §255(a).³²

While rejecting a requirement of bad purpose, the lower courts have differed somewhat in articulating what is required to make a violation willful. This cannot avail Northwest, however, for the court below made clear that on this

³¹ As this Court explained in *Corning*, 417 U.S. at 207:

“The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics since Congress recognized as well that discrimination in wages on the basis of sex ‘constitutes an unfair method of competition.’ ”

³² *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied 409 U.S. 948 (1972); *Brennan v. General Motors Acceptance Corp.*, 428 F.2d 825, 828 (5th Cir. 1973); *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1974), cert. denied 419 U.S. 881 (1974); *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Brennan v. Air Terminal Parking, Inc.*, 21 W.H. Cases 475, 482 (D.S.C. 1974), affirmed 498 F.2d 1397 (4th Cir. 1974); *Brennan v. Zager*, 22 W.H. Cases 323, 328 (M.D. Tenn. 1975), affirmed 529 F.2d 524 (6th Cir. 1975), cert. denied 429 U.S. 821 (1976); *Dunlop v. State of Rhode Island*, 398 F. Supp. 1269, 1275 (D.R.I. 1975), reversed on other grounds 22 W.H. Cases 1272 (1st Cir. 1976); *Conklin v. Joseph C. Hofgesang Co.*, 407 F. Supp. 1090, 1094 (W.D.Ky. 1975); *Pezzillo v. Gen. Tel. & Electron. Inform. Sys., Inc.*, 414 F. Supp. 1257, 1269 (M.D. Tenn. 1976); *Dunlop v. New Hampshire Jockey Club, Inc.*, 420 F. Supp. 416, 423-424 (D.N.H. 1976); *Usery v. Goodwin Hardware, Inc.*, 426 F. Supp. 1243, 1267 (W.D. Mich. 1976); *Herman v. Roosevelt Fed. Sav. & L. Ass’n*, 432 F.Supp. 843, 851 (E.D. Mo. 1977).

record Northwest's conduct was "willful" under *any* of the arguable standards; indeed, the Court below proffered a construction of §255(a) *more favorable to defendants* than that applied by most courts (App. 51c-59c).

Northwest argues (Pet. 27) that the definition of "willful" under §255(a) must be the same as that accorded the same term under the FLSA's criminal provision, 29 U.S.C. §216(a). We doubt the merit of that contention.³³ But even if it had merit, it would not matter here, for the court below found that the violation here was "willful" even under the § 216(a) standard. App. 58e, n. 230.³⁴

³³ § 216(a) was enacted in 1938, and § 255(a) in 1966, and there is no evidence that in 1966 Congress was aware of, let alone intended to incorporate into § 255, the meaning assigned "willful" under § 216(a). Moreover, as the court below recognized (App. 58e, n. 230), the "purposes of the two sections are entirely different": § 216(a) punishes criminal conduct, whereas § 255(a) implements "a policy to which punishment is entirely foreign" (*id.*). That Congress "used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula," *United States v. Bishop*, 412 U.S. 346, 359-360 (1973) (emphasis added), hardly means, as Northwest suggests (Pet. 27), that Congress so intended in civil and criminal statutes enacted 28 years apart. Thus, while "willful" in the criminal tax fraud statutes requires evil purpose (as *Bishop* held), that same term in the civil tax fraud statutes has been construed to require only "intentional, knowing and voluntary" conduct. *Monday v. United States*, 421 F.2d 1210, 1215-16 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970), and cases cited therein.

³⁴ The judicial definition of "willful" in § 216(a) has remained constant throughout several decades. *Hertz Driverself v. United States*, 150 F.2d 923, 928-929 (8th Cir. 1945); *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir. 1951), cert. denied, 342 U.S. 876 (1951); *Coleman, supra*, 458 F.2d at 1142; *United States v. Fidanian*, 465 F.2d 755, 760 (5th Cir. 1970). As stated in *Nabob*, 190 F.2d at 480, to be "willful" under § 216(a) "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, acci-

There is, accordingly, no occasion in this case to review the application of §255's three-year statute of limitations.³⁵

IV

The district court denied plaintiffs liquidated damages for the Equal Pay Act violations, holding that Northwest had met its burden of proving a defense under 29 U.S.C. § 260 (App. 1b-2b).³⁶ The court below reversed, and remanded "the matter of liquidated damages in toto for reconsideration by the District Court" (App. 69c). Northwest's argument why this Court should review that ruling rests upon a misunderstanding both of the decision below and of § 260's place in the FLSA legislative scheme.

Section 260 modifies the "automatic" liquidated damages command of § 216(b) by conferring discretion upon the court to reduce or withhold liquidated damages,

"if the employer shows to the satisfaction of the court that the act or omission giving rise to such [FLSA] action was in good faith and that he had reasonable

dentially or by ordinary negligence." This was the existing definition of § 216(a) in 1966, when § 255(a) was enacted. The court below expressly held: "We reach no different conclusion in this case by that definition" (App. 58e, n. 230).

³⁵ Northwest's implication (Pet. 29, n. 16) that this holding resulted in a 50% inflation of its liability is incorrect. The holding resulted in backpay from 1967 to date rather than 1968 to date.

³⁶ The term "double damages" conveys a distorted impression of the potential significance of this issue; even if granted, liquidated damages would have a relatively minor effect upon the total backpay award. Only the stewardesses who affirmatively joined the lawsuit as Equal Pay Act plaintiffs would be eligible for liquidated damages—mere class members would not, 29 U.S.C. § 256—and liquidated damages would be in lieu of interest. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715 (1954). Thus, the interest awarded by the district court, App. 14b-15b, which has been accruing and compounding for as much as 11 years, must be offset in evaluating the impact of a liquidated damages award.

grounds for believing that his act or omission was not a violation of the [FLSA] . . .”

As the conjunctive “and” in § 260 makes clear, the employer bears the burden of proving both subjective good faith and objective reasonable grounds;³⁶ and even then the court retains discretion to award liquidated damages in whole or in part.³⁷

In the instant case, the district court apparently found that Northwest had met both standards. That court based its conclusion upon the following analysis (App. 1b-2b):

“The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardess’ bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point. The Court finds ‘good faith’ on the part of the Defendant....”

Northwest asserts (Pet. 30) that the court below, in reversing, “held that four of these five factors were irrelevant to the determination of reasonable, good faith belief.” That

³⁶ *Rothman v. Publicker Industries*, 201 F.2d 618, 620 (3rd Cir. 1953). Accord: *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2nd Cir. 1953), cert. denied 346 U.S. 877 (1953); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 947 (2nd Cir. 1959) (Friendly, J.); *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960); *McClanahan v. Mathews*, 440 F.2d 320, 322-323 (6th Cir. 1971); *Richard v. Marriott Corp.*, 549 F.2d 303, 306 (4th Cir. 1977). See also 29 C.F.R. § 790.22(b).

³⁷ *McClanahan, supra*, 440 F.2d at 322-324; 29 CFR § 790.22(b).

is a misreading of the decision below. The court below recognized that the first four factors enumerated by the district court were relevant to the *subjective* standard (good faith), but held that in the particular circumstances of this case they did not support the district court’s holding on the *objective* standard (reasonable grounds). As the court below explained (App. 66c-67c).

“That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks. Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds. That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition, the industry custom nor the employees’ silence was a reliable indicium of the demands of the law” (footnotes omitted).³⁸

³⁸ Northwest’s efforts to denigrate the significance of the consideration in the last sentence of this quotation are disingenuous. (Pet. 30-31, note 17). The airline industry, *en masse*, witnessed the demise, as sex-discriminatory, of a number of long-standing industry practices immediately after Title VII was enacted. Northwest’s own litigation experiences in 1965-1968 respecting two of these practices—requiring stewardesses to retire at age 32, and earlier upon marriage—are recounted in the district court’s findings (App. 25a-27a). The “employment practices at issue in this litigation” (Pet. 31, n. 17) occurred from 1967 through 1977, and all of the lawsuits cited by the court below were commenced prior to, or early in, this period. The court indicated (“e.g.”) that the lawsuits cited were merely exemplary. See, in addition, e.g., *Evenson v. Northwest Airlines*, 1 FEP Cases 177 (E.D. Va. 1967); *Air Transport Association v. Hernandez*, 1 FEP Cases 168 (D.D.C. 1967); *Vogel v. Trans World Airlines*, 2 FEP Cases 297 (W.D. Mo. 1969); *Lansdale v. United Airlines*, 437 F.2d 454 (5th Cir. 1971), reversing 2 FEP Cases 462 (S.D. Fla. 1969). Two of the lawsuits cited by the court below involved challenges to pay differentials between pursers and

The court below recognized, of course, that the fifth factor—the absence of any clear legal precedent or guideline precisely in point—is relevant to the objective standard (App. 67c). “Indeed, just that sort of employer-predication was the concern of Congress when it enacted [§ 260]” (App. 68c). But the court below observed, accurately, that the district court had made no finding that Northwest’s decision to pay stewardesses less than pursers was in any way influenced by uncertainty about the law, and remanded for the district court to address this question of fact (*id.*). This was no mere formality, for as the court below had earlier noted (App. 60c), Northwest’s only witness on the subject did not claim that the Company had been influenced by any uncertainty in the law, but rather that the Company had maintained the dual wage scale because it felt that the jobs were different; indeed, it does not appear that Northwest sought or obtained “any sort of legal advice at all.” (*id.*). The court’s holding that uncertainty in the law is relevant only if it influenced the employer’s decision is in accord with the decisions of all other Circuits which have addressed the question.³⁹

stewardesses, as Northwest recognizes (Pet. 13, note 6; but contrast Pet. 31, note 17), and the EEOC found reasonable cause in 1970 to believe such differentials unlawful.

³⁹ See cases cited *supra*, p. 28, n. 36. See also *Snell v. Quality Mobile Home Brokers, Inc.*, 424 F.2d 233, 236 (4th Cir. 1970). Mere errors of fact—i.e., a mistaken understanding of employees’ duties—does not suffice to establish a § 260 defense. An employer is “responsible for knowing what its employees were doing,” *Day & Zimmerman v. Reid*, 168 F.2d 356, 360 (8th Cir. 1948). The legislative history (described at p. 33, n. 41, *infra*) confirms that § 260 was enacted to assist employers affected by *legal* uncertainty. For examples of evidentiary showings which met the objective standard of § 260, see *General Electric Co. v. Porter*, 208 F.2d 805, 816 (9th Cir. 1953); *Foremost Dairies v. Ivey*, 204 F.2d 186 (5th Cir. 1953); *Fred Wolferman, Inc. v. Gustafson*, 169 F.2d 759, 765 (8th Cir. 1948).

Finally, the district court’s opinion (App. 1b-2b) had given no indication that it was aware that the employer’s satisfaction of both the subjective and objective standards did not automatically require the denial of liquidated damages, but merely triggered the existence of discretion in the district court to “award no liquidated damages or award any amount thereof not to exceed [double damages]” (§ 260). It is not clear whether the district court recognized that it possessed such discretion, nor, if it did, what factors influenced its exercise thereof. The court below quite properly reminded the district court of this point and directed that it be addressed on remand (App. 68c). Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-417, 422-423 (1975).

Northwest attempts to make this perfectly reasonable disposition appear worthy of this Court’s attention through a misreading of § 260’s place in the legislative scheme. Northwest argues that the court’s rejection of the first four factors is inconsistent with the legislative concerns which prompted adoption of § 260 (Pet. 30):

The four factors that the court below discarded are derived from the statute itself. In 1947 Congress gave statutory relief for “good faith” acts to remove the harshness of a liquidated damages provision that previously had been construed as mandatory. Congress found that without the amendment the Fair Labor Standards Act would result in “wholly unexpected liabilities, immense in amount and retroactive in operation” by unexpectedly overriding “long-established customs, practices, and contracts between employers and employees.” 29 U.S.C. § 251(a). (Congressional findings and declaration of policy). The amendments, including the “good faith” provision of § 260, were intended to avoid this result and to “protect the right of collective bargaining.” 29 U.S.C. § 251(a)(6). Yet the decision below holds that (i) tradition and custom, (ii) industry practice, (iii) the collective bargaining agreement, and (iv) Northwest’s experience under it—the very circumstances that Congress declared give

presumptive legitimacy to employment practices—are irrelevant in applying the “good faith” provision of § 260.

The simple answer is that the decision below *did* consider these circumstances relevant in applying the “good faith” provision of § 260; it held them irrelevant only to the “reasonable grounds” provision.

There is, however, a more fundamental deficiency in Northwest’s argument: it misconceives the significance of the declaration in 29 U.S.C. § 251. That declaration explained *not* the reasons for adopting § 260, but rather the reasons for adopting 29 U.S.C. § 252.⁴⁰ The legislative materials make clear that the *sole* reason for adopting § 260 was to provide discretion to district courts to relieve employers

⁴⁰ The principal stimulus to enactment of the Portal-to-Portal Act, as its title suggests, was the Supreme Court’s construction of the FLSA, in three decisions, as treating time spent travelling between the employer’s gate and the workplace as time “worked.” In each of these decisions the Court declared it irrelevant that the custom in American industry, confirmed in collective bargaining agreements, was *not* to treat such time as time worked. *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 602 (1944); *Jewell Ridge Corp. v. Local*, 325 U.S. 161, 167 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Congress responded to these decisions by enacting 29 U.S.C. §§ 252 and 254. § 254 overruled the Supreme Court’s construction of the FLSA in these cases. § 252 retroactively exonerated employers for antecedent violations except in those instances where custom and/or collective bargaining agreements had treated such time as time worked. It has been universally recognized that the findings and declaration of policy in 29 U.S.C. § 251 were addressed to these provisions, and particularly to § 252 (which, it could be foreseen, would be challenged as unconstitutional). The “purpose” articulated in § 251 was “fulfilled by the enactment of Section 2 [§ 252].” *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956). See also *Battaglia v. General Motors Corp.*, 169 F.2d 254, 258 (2nd Cir. 1948); *Addison, supra*, 204 F.2d at 96 (L. Hand, J., concurring).

of liquidated damages where they have attempted to comply with the law but been disabled by uncertainty as to what the law requires.⁴¹

V

The courts below ruled that the 1972 amendment to Title VII restricting backpay awards to two years prior to the filing of the EEOC charge is inapplicable to cases pending in court at the time of its adoption. That ruling is in accord with the decision of every Court of Appeals which has considered the question,⁴² and is plainly correct for the reasons

⁴¹ As explained in H. Rep. No. 71, 80th Cong., 1st Sess. 3, 7-8 (1947), and as the court below understood, App. 64c, § 260 was a response to the decisions of the Fourth Circuit and the Supreme Court in *Missel v. Overnight Motor Transportation Co.*, 126 F.2d 98 (4th Cir. 1942), affirmed 316 U.S. 572 (1942). See also 93 Cong. Rec. 2234-35 (1947) (colloquy between Sens. Donnell and Ferguson). In *Missel*, the Fourth Circuit applied the then-mandatory liquidated damages provision of the FLSA with the following “lament,” 126 F.2d at 111:

“It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it.”

The Supreme Court, noting that the violation had stemmed from the employer’s “inability to determine whether the employee was covered by the Act, (316 U.S. at 582)—an inability caused by uncertainty as to the proper construction of one of the Act’s exemptions (*id.*)—held that “[p]erplexing as petitioner’s problem may have been” the liquidated damages provision was mandatory (*id.* at 582).

There is not a word in the legislative history suggesting that § 260 was to be available to employers in any circumstances other than good faith reliance, upon reasonable grounds, on a legal construction which ultimately turns out to be wrong.

⁴² *Bing v. Roadway Express*, 485 F.2d 441, 453, n. 14 (5th Cir. 1973); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975), vacated and remanded for consideration of other issues, 431

stated in the opinion below (App. 71c-72c).

Even if the question warranted this Court's attention in an appropriate case—a doubtful proposition, for the number of pre-1972 lawsuits still pending surely must be small—this is not such a case, for the decision below may yet produce a two-year limit. The court below ruled that the backpay limit for cases filed prior to the 1972 amendments is "the period prescribed by the most analogous state statute" (App. 73c). The court remanded to the district court the determination of what state statute is most analogous, noting that "[t]he statutes cited to us by the parties contain two- or three-year limits" (App. 74c, n. 300).

VI

The final issue which Northwest seeks to have this Court review is one which (1) arises out of a *sui generis* set of facts which render the legal issue of no general importance, (2) arises at an interlocutory stage, and (3) may in fact end up without having any practical effect upon any party's rights or obligations. To understand why this is so, it is necessary to describe the facts and holdings below in more detail than Northwest does in the petition.

The district court had awarded backpay under Title VII to all stewardesses who had flown within two years of the filing of the charge, irrespective of whether and when they had terminated their employment (App. 8b-9b; ¶ 7(a)). Northwest appealed, contending that those who terminated employment more than 90 days prior to the filing of the first EEOC charge no longer had Title VII claims which they could assert on their own behalf, and thus should be excluded from the class recovering backpay. On this issue, Northwest prevailed in the court below. The court concluded that "the District Court on remand must exclude

U.S. 951 (1977); *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977).

from the Title VII recovery period those employees whose connection with NWA was dissolved more than ninety days before the class filing with the Commission" (App. 90c; see also *id.* at 81c-84c).

The court was concerned, however, that some among those to be excluded might have been misled to their detriment by Northwest's failure to assert a time-limits defense prior to trial.⁴³ The district court had sent class notices long before trial, at a time when the employees in question could still have timely joined in the *Equal Pay Act* portion of this lawsuit,⁴⁴ advising these employees that even if they did not join in the *Equal Pay Act* portion of the lawsuit they "would be entitled to share in any money award which the Court grants under the Civil Rights Act" (App. 85c). Northwest's counsel, who had not asserted any defense based on timeliness, did not challenge this wording when it was proposed.⁴⁵ It is thus theoretically possible that some employees who would otherwise have timely joined the *Equal Pay Act* portion of the lawsuit refrained from doing so in reliance upon the notices' assurance that they would

⁴³ Northwest never pleaded a time-limit defense. At the close of the trial, it requested leave to amend its answer to assert that the action was untimely (App. 90c; Trial Tr. at 3571). Even then, Northwest did not focus a claim upon the status of those who had terminated more than 90 days before the filing of the first EEOC charge (Trial Tr. at 3571). Northwest first attacked the inclusion of these employees in its brief on remedies, following the district court's issuance of its findings of fact and conclusions of law.

⁴⁴ The notices were mailed in 1971. Under either a two- or three-year statute of limitations (See III, *supra*), employees who had terminated more than 90 days but less than two years prior to the filing of the first EEOC charge (on March 28, 1970) retained timely *Equal Pay Act* claims.

⁴⁵ Plaintiffs' counsel tendered proposed class notices for the Court's consideration. Northwest filed a document commenting in other respects upon the propriety of sending Plaintiffs' proposed notices, but did not challenge the text or ask that it be changed.

recover in any event, should plaintiffs prevail, under Title VII. The court below concluded that Northwest was estopped by its failure to assert a time limits defense before the notices were sent from objecting to recovery by any employees who were "lulled into inaction on their Equal Pay Act rights in the understanding that they would share in any Title VII recovery" (App. 90c).

Accordingly, as an exception to its ruling that those who terminated employment more than 90 days before the filing of the first EEOC charge must be denied recovery, the court below ruled that the district court "must retain in the class for the Title VII recoverv those employees who would have brought themselves within the Equal Pay Act class by filing consents" (App. 90c, 2e).⁴⁶ The court found that the statute did not deprive it of the traditional equitable power to apply estoppel principles in this manner (*id.* 85c- 89c). It is this construction which Northwest claims is worthy of review.

Assuming *arguendo* that the question whether Title VII's time limit is a "jurisdictional prerequisite" such that it is not subject to "equitable modification" were one warranting review in an appropriate case,⁴⁷ this is not such a case

⁴⁶ The court's original opinion had used the word "could" rather than "would"—a formulation which would have provided recovery to *all* the terminated employees and which thus was inconsistent with the clear intentment of the court's discussion at App. 90c. The court corrected the mistake *sua sponte*, App. 2e.

⁴⁷ Northwest's contention (Pet. 38) that this Court has already decided this issue in favor of its position, in *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), is not supported by a reading of the opinion in that case. This Court held in *Electrical Workers* that an employee's pursuit of grievance-arbitration procedures does not toll the time for filing an EEOC charge. But the Court arrived at that result by carefully examining the grounds advanced for tolling in such circumstances, and concluding that they did not meet the requirements for an equitable

for several reasons:

(1) This case arises on a *sui generis* set of facts. Indeed, it is virtually inconceivable that the precise issue presented here would ever recur in another case. And the peculiar facts create substantial doubt that a resolution of this case would have any precedential value for other cases.⁴⁸

(2) It is doubtful whether any employee will in fact recover backpay because of this ruling. The court has merely provided an opportunity for former employees to attempt to prove that they "would have" joined the Equal Pay Act portion of the lawsuit but for the wording of the class notice. We do not know whether there are any persons who claim to have relied in this respect. And even if there are, it is far from certain that they will ever learn of the court's ruling and thus be able to avail themselves of the opportunity it affords. (The affected employees terminated their employment in 1968 and 1969, and neither plaintiffs nor Northwest have addresses post-1969 at which to contact them.) Thus, if this Court were not inclined to grant certiorari on the other issues in this case, it would be a classic instance of the "tail wagging the dog" to delay further the indisputably eligible employees' receipt of the

modification of the time limit. Had the Court's holding been that *all* equitable modifications are precluded, there would have been no occasion to analyze in such detail the alleged justification for the particular modification sought in that case.

⁴⁸ The issue here is not whether a court has jurisdiction over an otherwise untimely Title VII action based upon a tolling principle. The issue here, rather, is whether, in a case over which the court indisputably has jurisdiction, it may extend a remedy to particular class members based upon estoppel. This Court has already held that class members who did not themselves file charges may share in Title VII recoveries—the filing of a charge is not "jurisdictional" in that sense—and that the courts have traditional equitable discretion in formulating class remedies for Title VII violations. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, 416-425 (1975).

remedies due them to litigate this question now. If in fact there prove to be actual claimants who prevail on this issue, Northwest can seek review at that time without delaying the rights of everyone else.

(3) A victory for Northwest on this issue in this Court would be meaningless, even if such employees *do* exist and come forward. For the "estoppel" upon which the court below relied would support tolling of the *Equal Pay Act's* time limit just as the court found it justified equitable consideration under Title VII. And there can be no question but that the Equal Pay Act's time limit is a traditional statute of limitations, and thus subject to equitable tolling principles.⁴⁹ Thus a reversal on this issue would result merely in the employees' securing recovery under the Equal Pay Act rather than Title VII.

⁴⁹ See e.g., *Hodgson v. Humphries*, 454 F.2d 1279, 1283-84 (10th Cir. 1972); *Ott v. Midland-Ross Corp.* 523 F.2d 1367, 1370 (6th Cir. 1975); *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, 487 (5th Cir. 1974).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied. Northwest's alternative suggestion—that the Court "vacate the judgment below and remand the case for full reconsideration in light of . . . intervening decisions" (Pet. 30)—is a frivolous stalling tactic. The Court of Appeals held the petition for rehearing for ten months awaiting the issuance of this Court's decisions, and in denying rehearing declared that it had considered the petition "in light of . . . the decisions of the Supreme Court of the United States subsequent to the opinion" (App. 2f). The Court of Appeals was plainly correct in its assessment that none of the intervening decisions warranted alteration of its decision; but correct or not, the Court below has already undertaken the "reconsideration" for which Northwest invites a remand. In a footnote, Northwest notes that there are yet additional Title VII and Age Discrimination cases on the Court's docket *this term* (Pet. 39, n. 28). Each of the cases cited has now been decided, and none bears on the issues presented in the petition.

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